Supreme Court, U.S.
FILED
APR 12 2010
OFFICE OF THE CLERK

No. 09-628

In The
Supreme Court of the United States

RICHARD VEZINA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF

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INTRODUCTION

In the Florida state courts, Petitioner raised the same federal claim that this Court recently decided in *Padilla v. Kentucky*, ___ U.S. ___, 2010 WL 1222274 (March 31, 2010). Petitioner exhausted his state remedies by fairly presenting the claim to the Florida trial court, the District Court of Appeal, and finally to the state Supreme Court in a timely request to invoke its discretionary jurisdiction. Petitioner then timely filed a petition for a writ of certiorari before this Court, asking it – if Padilla prevailed – to grant certiorari, reverse, and remand this case to the Florida courts with instructions to reconsider it in light of *Padilla*.

In Respondent's Brief in Opposition (hereinafter "Respondent's Brief"), the State makes three arguments in opposition to a grant of certiorari.

> (1) The State unsuccessfully attempts to distinguish *Padilla* from the present case on its facts. *See* Argument I, below.
>
> (2) The State argues two "procedural defaults" under Florida state law as adequate and independent state grounds for denying relief, even though it did not raise them before the Florida courts and those courts did not deny relief on that basis. *See* Argument II, below.
>
> (3) The State argues that Petitioner should have filed the petition for a writ of certiorari in this Court within 90 days of the District Court of Appeals decision in this

case, rather than within 90 days of the Florida Supreme Court's decision denying relief. *See* Argument III, below.

None of these arguments has merit.

ARGUMENT

I. THIS COURT'S DECISION IN *PADILLA v. KENTUCKY* IS INDISTINGUISHABLE FROM THE PRESENT CASE ON THE MERITS.

The State's first attempt to distinguish *Padilla* from the present case is nearly incoherent: "Even if [petitioner's papers were] timely filed in this Court and in the Florida courts, this case is still distinguishable from *Padilla*" because Padilla's post-conviction motion was filed on time. *Id.* at 11. This oddly circular argument seems to be no more than the argument that Petitioner's papers were not timely filed, to which Petitioner responds in Arguments II and III, below. In any event, this is not a basis on which to distinguish *Padilla* on its *merits*.

The State's second purported distinction fares no better. It argues that "it does not appear that Padilla was ever informed by the court that he faced possible deportation consequences. *Kentucky v. Padilla*, 253 S.W.3d 482 (Ky. 2008)." Respondent's Brief, p. 12. On the contrary, Kentucky requires the court to inform every defendant of the possible deportation consequences. As this Court stated: "To this end, we find it significant that the plea form currently used in

Kentucky courts provides notice of possible immigration consequences." *Padilla*, *11, n.15; *see Kentucky v. Padilla*, *supra*, 253 S.W.2d at 483 ("he was aware of the possibility of deportation"). The two cases are not distinguishable on this basis. In both cases, the defendant was informed by the court of the possible immigration consequences. In both cases, the defendant was affirmatively misadvised by defense counsel.

The State attempts to distinguish *Padilla* from this case by pointing out that in this case, "Petitioner was asked if he had been promised anything differently than that told to him by the court. Petitioner informed the trial court under oath that he had not." Respondent's Brief, p. 12. The State offers nothing other than an assumption that this standard plea colloquy language did *not* occur in *Padilla*. *Ibid.* This routine language about other promises refers to on-the-record promises in criminal court, such as dismissal of charges or agreements as to sentence. There is no reason to believe that Padilla was not asked the same question. It is very likely that this same boilerplate question and answer appeared in Padilla's plea colloquy, as it appears in virtually every plea colloquy ever taken in modern times. This does not serve to distinguish the two cases.

Finally, the State argues that petitioner "basically admitted that there was no imminent threat of deportation." Respondent's Brief, p. 13. The State has profoundly mischaracterized Petitioner's argument: "Technically this is not 'deportation' but it amounts to

the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain eventually to occur." Respondent's Brief, E 9.

In essence, the State argues Petitioner did not prove prejudice from the ineffective assistance that occurred when his lawyer affirmatively misadvised him that his guilty plea will not result in deportation. However, as this Court held in *Padilla*, because the state court denied relief without a hearing, the facts alleged in the motion must be taken as true. *Padilla*, p. *8. As the Kentucky courts did in *Padilla*, the Florida courts here denied the same claim without a hearing, so Petitioner's factual allegations must also be taken as true. The State has offered no legitimate basis on which to distinguish this case from *Padilla*.

II. THE STATE HAS NOT ESTABLISHED ANY STATE PROCEDURAL DEFAULTS AS ADEQUATE AND INDEPENDENT STATE GROUNDS FOR DENIAL OF RELIEF, BECAUSE (A) THE STATE DID NOT RAISE THESE ISSUES BEFORE THE STATE COURTS, AND (B) THE STATE COURTS DID NOT RELY ON THEM IN DENYING RELIEF.

The State argues two procedural defaults under Florida law as adequate and independent state grounds for denial of relief. *See* Respondent's Brief, pp. 10-11.

(1) It argues "Petitioner's attempt to seek review in the Supreme Court of Florida was untimely filed." Respondent's Brief, p. 10; *see* Argument II(A), below.

(2) It argues Petitioner's motion in the state trial court was untimely filed. Respondent's Brief, pp. 10-11; *see* Argument II(B), below.

Neither argument is well-taken.

To constitute an adequate and independent state ground supporting a denial of relief, first, the State must assert the procedural default before the state court as a reason for denying relief, and second, the state court must in fact rely on the adequate and independent state ground in denying relief. *Michigan v. Long*, 463 U.S. 1032 (1983) (state court must make "plain statement" that its decision was based on an independent, adequate state ground to rebut presumption that federal issue was determinative); *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 1189-1191 (1995). In this case, the State's assertions of procedural default must fail because it cannot establish that the state court clearly and unambiguously relied on them to reject the claim. *See Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

Here, none of the state courts gave *any* reasoned explanation for rejecting Petitioner's federal constitutional claim. App. 1, 2, 3, 5. There is no showing to rebut the presumption that the state courts in fact rejected the claim on its merits. *See Ylst v.*

Nunnemaker, 501 U.S. 797 (1991); *Cowart v. Hargett*, 16 F.3d 642, 645 (5th Cir. 1994); *Hunter v. Aispuro*, 982 F.3d 344, 347-48 (9th Cir. 1992).

A. The Claim of Untimely Filing in the Florida Supreme Court.

This claim fails for three reasons. First, the Petition for a Writ of Certiorari was timely filed in the Florida Supreme Court, so there was no procedural default in this respect. Even if this had been a procedural default, the State did not raise this objection, and the Florida Supreme Court did not rely upon it in denying relief, so it cannot constitute an adequate and independent state ground for denying relief.

The State first claims that Petitioner did not timely file his petition for a writ of certiorari in the Florida Supreme Court because he did not file his brief within 30 days after the decision of the District Court of Appeals was "issued." Respondent's Brief, p. 10. It is wrong. Petitioner may invoke the jurisdiction of the Florida Supreme Court by filing a petition in that court within 30 days after the decision of the District Court of Appeals is "rendered." Florida Rules of Appellate Procedure, Rule 9.120(b). The DCA decision is "rendered" not on the date of issuance, but when the clerk of the lower court later files the District Court of Appeals' decision in the lower court.

Florida Rules of Appellate Procedure, Rule 9.020(h).[1] In this case, Petitioner filed his petition for a writ of certiorari in the Florida Supreme Court on the 27th day after the DCA opinion was rendered. Petitioner therefore timely filed the petition for a writ of certiorari in the Florida Supreme Court.

Second, this claim fails because the State did not raise this objection before the court below. Indeed, the State did not file any objections of any kind before the Florida Supreme Court. Because the State did not object to this "procedural default" before the state court, this issue cannot constitute an adequate and independent state ground justifying the state court's denial of relief.

Third, the Florida Supreme Court did not base its denial of relief in any way on this alleged procedural default. *See* App. 1. Therefore, this issue cannot constitute an adequate and independent state ground justifying the state court's denial of relief.

B. The Claim of Untimely Filing Before the Florida Trial Court.

This claim also fails for the same three reasons. First, the motion for post-conviction relief was timely filed in the Florida trial court, so there was no procedural default in this respect. Even if this had

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[1] "An order is rendered when a signed, written order is filed with the clerk of the lower tribunal."

been a procedural default, the State did not raise this objection before the District Court of Appeals, or Florida Supreme Court, and those courts did not rely upon it in denying relief, so it cannot constitute an adequate and independent state ground.

Petitioner filed his post-conviction motion in the trial court within the two-year opportunity allowed in *State v. Green*, 944 So.2d 208 (Fla. 2006). The rationale for allowing this exception to the normal post-conviction statute of limitations is that it would be unfair to run the time before the defendant knew or should have known of the threat of deportation, and could first articulate a *prima facie* case. *State v. Ruiz*, ___ So.3d ___, 2010 WL 934079 (Fla. App. 2010).

Even if this had been a procedural default, the State did not raise this objection before the state courts. Respondent's Brief, C-1, F-1. On the contrary, the State explicitly stated: "Defendant is not subject to or threatened with deportation and is simply filing his motion as a potential safety measure 3 days *before the deadline*." Respondent's Brief, p. C-4 (emphasis supplied). The State expressly conceded that the motion was timely filed. This issue therefore cannot constitute an adequate and independent state ground for denial of relief.

Moreover, the District Court of Appeal and Florida Supreme Court did not rely upon any claim of untimeliness in denying relief. They denied relief with *per curiam* affirmances, without explanation.

App. 1, 2. This issue therefore cannot constitute an adequate and independent state ground for denying relief.

III. THE PETITION FOR CERTIORARI BEFORE THIS COURT WAS TIMELY FILED; EVEN IF NOT, THIS COURT HAS THE POWER TO EXCUSE THIS NON-JURISDICTIONAL PROBLEM AND SHOULD DO SO ON THE FACTS OF THIS CASE.

The State argues that under Florida law, Petitioner should have filed the petition for a writ of certiorari within 90 days of the decision of the District Court of Appeals in this case, rather than within 90 days of the Florida Supreme Court's decision. Respondent's Brief, pp. 8-10. Petitioner sought to exhaust state remedies when he timely invoked the discretionary jurisdiction of the Florida Supreme Court, which was denied. If there is discretionary review by the highest state court, it must be sought. *California v. Trombetta*, 467 U.S. 479, 484 (1984). The 90 days to file the present petition for a writ of certiorari therefore properly runs from the Florida Supreme Court's decision declining to exercise jurisdiction in this case, and the petition was timely filed.

Even if this is deemed untimely, Petitioner asks this Court to excuse this non-jurisdictional problem, and decide the present petition on its merits.

A. The Petition for a Writ of Certiorari Was Timely Filed with This Court.

When petitioner seeks discretionary review of the decision of an intermediate state appellate court by the state court of last resort, the petition for a writ of certiorari before this Court "is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." Sup. Ct. R. 13.1.

Petitioner timely invoked the discretionary jurisdiction of the Florida Supreme Court by filing a Notice to Invoke Discretionary Jurisdiction pursuant to Florida Rules of Appellate Procedure, Rule 9.120(a) ("Discretionary Proceedings to Review Decisions of District Courts of Appeal"). Petition for a Writ of Certiorari, App. 25. Florida Rules of Appellate Procedure, Rule 9.120(a) states: "This rule applies to those proceedings that invoke the discretionary jurisdiction of the supreme court described in Rule 9.030(a)(2)(A)." Petitioner thereafter timely filed a Petition for a Writ of Certiorari. App. 11.

Florida Rules of Appellate Procedure, Rule 9.030 governs jurisdiction of the Florida Supreme Court. Rule 9.030(a)(2)(A) provides:

> (2) *Discretionary Jurisdiction.* The discretionary jurisdiction of the supreme court may be sought to review
>
> (A) decisions of district courts of appeal that
>
> . . .

> (ii) expressly construe a provision of the state or federal constitution. . . .

Florida Rules of Appellate Procedure, Rule 9.130(a) (footnote omitted).

On August 26, 2009, the Florida Supreme Court dismissed the petition, stating: "It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *See Jenkins v. State*, 385 So.2d 1356 (Fla. 1980)." App. 1. One interpretation of this is that the Florida Supreme Court declined to exercise the discretionary jurisdiction to review constitutional questions that had been invoked by Petitioner. If this is the case, the 90 days for filing the petition for a writ of certiorari in this Court began to run on this date, and the petition was timely filed.

B. Even if the Petition Was Untimely, the Court May Rule on Its Merits Nonetheless, and Should Do So Under the Circumstances of This Case.

If the State's construction is correct, and the Florida Supreme Court had no jurisdiction to exercise, this Court still has the power to consider the petition for a writ of certiorari as timely filed in this case. This Court has not regarded certiorari time limits in criminal cases as jurisdictional. *Taglianetti v. United States*, 394 U.S. 316, 317 n.1, 22 L. Ed. 2d 302, 89 S. Ct. 1099 (1969). Under the circumstances of this case, Petitioner respectfully requests that this

court ignore any "untimeliness" and consider the petition.

In this case, the reason for any "untimeliness" was to exhaust state remedies by affording the Florida Supreme Court an opportunity to rule in the first instance on the issue presented to this Court in the petition for a writ of certiorari. The petition was timely filed if the 90 days is deemed to begin on the date after the Florida Supreme Court denied review. The extraordinary rule entirely depriving the Florida Supreme Court of any jurisdiction at all to review "per curiam affirmed" decisions of the District Court of Appeal is so inconsistent with the normal practice of discretionary jurisdiction that it should not operate as a trap for the unwary litigant. Petitioner has pursued his claim to great lengths. This Court, in *Padilla*, vindicated his analysis. His diligence in exhausting his claim before the Florida Supreme Court, even if unnecessary, should not in fairness be held to justify denial of certiorari before this Court.

CONCLUSION

Petitioner therefore asks this Court to grant certiorari, reverse, and remand this case to the Florida courts for reconsideration in light of *Padilla*.

Respectfully submitted,

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